D.U.P. 84-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE ADMINISTRATOR OF UNFAIR PRACTICE PROCEEDINGS

In the Matter of

STATE OF NEW JERSEY (OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

DOCKET NO. CO-83-292

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Administrator of Unfair Practice Proceedings declines to issue a complaint with respect to an unfair practice charge alleging that the State had committed an unfair practice when it refused to pay Barbara Cohen, and other permanent part-time employees in various units represented by CWA, 1983 longevity salary increases pursuant to provisions in the parties' several collective negotiations agreements. The facts indicate that the parties' dispute is essentially grounded in their different interpretation of contractual language.

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Appearances:

For the Respondent
Irwin Kimmelman, Attorney General
(Michael Diller, Deputy Attorney General)

For the Charging Party
Steven P. Weissman, Associate Counsel

REFUSAL TO ISSUE COMPLAINT

On April 28, 1983, an Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") by the Communications Workers of America, AFL-CIO ("CWA"). The Charge which was amended on July 29, 1983, and most recently by letter dated October 21, 1983, alleges that the State of New Jersey ("State"), had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, N.J.S.A. 34:13A-5.4(a) (1) and (5). 1/

1/ N.J.S.A. 34";3A-5.4(a) prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charge. 2/ The Commission has delegated its authority to issue complaints to the undersigned and has established a standard upon which an unfair practice complaint may be issued. This standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act. 3/ The Commission's rules provide that the undersigned may decline to issue a complaint. 4/

For the reasons stated below the undersigned has determined that the Commission's complaint standards have not been met.

CWA alleges that the State committed an unfair practice when it refused to pay Barbara Cohen and other permanent part-time employees in various units represented by CWA, 1983 longevity salary increases pursuant to provisions in the parties' collective negotiations agreement.

In its response to the original and amended Charge the State sought its dismissal arguing that it was not timely filed.

2/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice ... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof..."

3/ N.J.A.C. 19:14-2.1

4/ N.J.A.C. 19:14-2.3

The State contends that the Charge on its face indicates that more than six months elapsed between the State's refusal to pay the longevity increase and the filing of the instant Charge.

N.J.S.A. 34:13A-5.4(c) states in pertinent part that:

> ...no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge...

The undersigned determines without addressing the timeliness issue, that a complaint shall not issue for the following reasons. In a matter recently decided, In re State of New Jersey, Dept. of Human Services ("Human Services"), D.U.P. No. 84-11, 9 NJPER ___ (¶ _____ 1983), the Director of Unfair Practices [5/] declined to issue a complaint with respect to an unfair practice charge which alleged unilateral changes in terms and conditions of employment under facts which indicated that the dispute was essentially grounded in their different interpretation of contractual language. [6/]

5/ Effective November 1, 1983, the Commission transferred to the Administrator of Unfair Practice Proceedings the authority to issue complaints and to refuse to issue complaints.

6/ The Director's decision, currently on appeal before the Commission, represents a departure from prior complaint issuance policy. In an early unfair practice decision the Commission's designee appeared to take a narrow approach concerning the propriety of complaint issuance in charges based upon contract breach claims. In In re Borough of Palisades Park, D.U.P. No. 78-1, 3 NJPER 238 (1977), where the issuance of a complaint was denied, the Director noted:

> The Commission does not view its role as the enforcer of collective negotiations agreements. Such a matter is appropriately the concern of an

(Continued)

In the instant dispute, CWA alleges that the State's failure to pay longevity increases to Cohen and to similarly situated employees violated Article VI of its various contracts with the State. In its response to the Cohen grievance concerning the failure to pay the increases, the State contended that, pursuant

6/ (Continued)

> arbitrator, or alternatively the courts upon a suit for contract enforcement. In certain limited situtations where a contract has been breached, the Commission will find that such a breach has also constituted a statutorily prohibited unilateral change in terms and conditions of employment without prior negotiations and thereby find that an unfair practice has occurred. [Citation omitted]

at n.8, and further:

> The Commission has adopted a deferral to arbitration policy which is applicable to those cases where it is reasonably probable that the underlying issues of an Unfair Practice Charge may be adjudicated through a binding arbitration mechanism. Given the preference of the Commission not to act as the enforcer of contracts, and the universally accepted principle that binding arbitration mechanisms or suits for contract enforcement are the appropriate means to resolve allegations of contract violation, the undersigned notes that the Charging Party's Superior Court complaint, and not the invocation of the unfair practice provisions of the Act, is the preferred method of obtaining the relief which Charging Party requests.

at n. 10.

Notwithstanding the above, and although adhering to a vigorous deferral to arbitration policy, the subsequent development of Commission caselaw precipitated a policy of routine complaint issuance in contract breach/unilateral alteration claims where binding arbitration mechanisms were not contractually available to the Charging Party. The discontinuance of this practice is based upon the determination to return to the policy considerations expressed in the above footnotes in the Palisades Park matter. The exercise of this policy is solely related to the propriety of processing charges involving purely contract breach issues, and is not predicated upon any question related to the Commission's jurisdictional authority to review such claims.

to a contractual provision, disputes concerning part-time employees are not grievable. 7/ The State has not contested the legality (i.e., negotiability) of the language of Article VI; neither does it appear that the State has repudiated the agreement with CWA. In addition, here, as in Human Services, there is no allegation of any facts describing the parties' prior experience in administering the disputed clause of their agreements which would establish that the State's action with respect to Cohen and other similarly situated employees constitutes a change. Again, as in Human Services, the charge does not set forth a basis for a claim that the State has set out to change the agreement or terms and conditions of employment. 8/

7/ Section B of the Memorandum of Understanding II, embodied in the Professional Unit Agreement states:

> Disputes concerning whether part-time employees are eligible for coverage under any provision of the Agreement between the parties or the terms and conditions of their coverage are deemed to be outside the scope of grievance procedures contained in the Agreement between the parties.

8/ In Human Services, supra, at 5 n.8 the Director cited In re United Telephone Co. of the West, 112 NLRB No. 103, 36 LRRM 1097 (1955), in which the NLRB stated:

> The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. It is obvious from the conflicting interpretations of the parties that the contract was not sufficiently clear to avoid a dispute over its terms. There is no showing that the Respondents, in carrying out the contract as they did, were acting in bad faith. Furthermore, the Respondents' action was in accordance with the contract as they construed it, and was not an attempt to modify or to terminate the contract. The provisions of Section 8(d) of the Act are therefore inapplicable in this case. Regarding the question of which party correctly interpreted

(Continued)

Accordingly, the undersigned declines to issue a complaint with respect to the instant charge. 9/

BY ORDER OF THE ADMINISTRATOR
OF UNFAIR PRACTICE PROCEEDINGS

Joel G. Scharff, Administrator

DATED: December 2, 1983
Trenton, New Jersey

8/ (Continued)

> the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: "...it will not effectuate the statutory policy...for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." [Consolidated Aircraft Corp., 47 NLRB 694, 12 LRRM 44, enf. 141 F.2d 785, 14 LRRM 553 (C.A. 9.]
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> * * *
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> In view of its contractual relations with the Respondents, the Union's recourse in this situation was to exhaust the possibility of settling the overtime question by negotiation and failing such settlement, to seek judicial enforcement of its construction of the contract. The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.

9/ In Human Services, the Director noted that the parties had specifically agreed upon an internal mechanism to resolve questions concerning the interpretation of the contractual provisions in dispute. In the present matter, it appears that the questions of contract interpretation and arbitrability may be placed before an arbitrator.